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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 800

◆

UNITED STATES OF AMERICA *Petitioner*

v.

THOMAS BALOGH *Respondent*

◆

ON PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

Respondent's
PETITION FOR REHEARING
including
Alternative Motion for Clarification

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MAY IT PLEASE THE COURT:

Within the time fixed by the rules of this Court, respondent files this his petition for rehearing, including an alternative motion for clarification of the decision of the Court rendered on January 20, 1947. The Court is requested to grant the petition or, in the alternative, the motion, for the reasons hereinafter discussed.

The summary action of the Court in vacating the judgment and remanding the case to the Circuit Court of Appeals, simultaneous with the granting of the petition for writ of certiorari, was inappropriate. Not only does this method of disposing of the case injure the respondent but

it does not show a proper regard for the deliberation and consideration by the Circuit Court of Appeals of the questions presented upon the petition for writ of certiorari and discussed in respondent's memorandum in opposition.

The court below did not ignore entirely the question raised by the Government that the administrative remedies had been exhausted. The case was argued as a companion case to the *Kulick* case in which this Court granted petition for writ of certiorari on January 20, 1947. (*Alexander* v. *United States ex rel. Kulick,* No. 840, October Term 1946) The *Kulick* case was decided by the court below (*United States ex rel. Kulick* v. *Kennedy,* 157 F. 2d 811) two days before the opinion was filed in the *Balogh* case (157 F. 2d 939). In the *Kulick* case the court below stated that one who had been accepted upon a preinduction physical examination had exhausted his administrative remedies so as to qualify himself to challenge the draft board order in defense to an indictment charging him with failure to report. This is implicit in the following words of the court below taken from its opinion in the *Kulick* case: "Moreover, although a number of the decisions could be explained upon the ground that those inducted had not wholly exhausted their administrative remedies [citing *United States* v. *Nelson,* 143 F. 2d 584 (CCA-2)]; in a number of others they had done so and no distinction had been established between the two. Indeed, in *United States* v. *Flakowicz, supra* (146 F. 2d 874), which had been one of these, the Supreme Court denied certiorari only a fortnight before May 12. While that court has said over and over again that such denials are not to be taken as affirmances, it was not to be expected on May 12, 1945, that the court would grant a writ in precisely the same circumstances in which it had just denied one." (157 F. 2d 811)

The failure of the court below to write upon this matter in the *Balogh* case should not be taken to indicate that the

question was not presented to the court below. The question was presented to the court in the briefs and oral argument. The court below had adequately and previously stated its views in the companion case. (*United States ex rel. Kulick* v. *Kennedy,* 157 F. 2d 811)

Even if this Court should regard the decision of the court below as a departure from its opinion in the *Falbo* case (320 U. S. 549) the importance of the questions presented and the need for clarification of the law as to how far one must go in order to exhaust his administrative remedies did not justify the summary reversal of the judgment below. Indeed, this Court should have analyzed the distinctions and grounds involved which were not involved in the *Falbo* case because of the amendment to the Selective Training and Service Act of 1940 by the Act of Congress on December 5, 1943. (50 U. S. C. App. 303, 304 (a), 57 Stat. 596, 599)

The decision cited by petitioner as grounds for its suggestion for the summary disposition upon petition for writ of certiorari (*Brotherhood of Railway and Steamship Clerks* v. *United Transport Service Employees,* 320 U. S. 715, rehearing denied, 320 U. S. 816) is not appropriate here. The reason is that the difference in the law and the distinction in the facts between the *Balogh* and the *Falbo* cases prevents the conclusion that the decision of the Court below was in defiance of the decision of this Court in the *Falbo* case. Even if it is considered to be in defiance of the decision in the *Falbo* case, it would be appropriate, because of the substantial differences in the two cases as contended by respondent, to write an opinion upon the matter after deliberation rather than summarily reversing the judgment.

Even when the United States District Court refused to follow the decision of this Court in *Minersville School District* v. *Gobitis,* 310 U. S. 586 (*Barnette et al.* v. *West Virginia State Board of Education,* 47 F. Supp. 251) this Court

did not summarily reverse, but took the case in for argument and, after deliberation, refused to reverse the judgment of the district court and follow the *Gobitis* case, *supra*.

Respondent contends that, if he has an opportunity to argue and brief the distinction between this and the *Falbo* case growing out of the amendment to the Act and Regulations requiring a preinduction physical examination, he may have the good fortune of persuading this Court to refuse to follow the *Falbo* case as the Court refused, in the *Barnette* decision, to follow the *Gobitis* case.

Without a considerate opinion by this Court on the matters presented, there remain interstices in the law. These blank spaces and dark spots in the law as to when the administrative remedies are exhausted serve only to confuse and confound the lower courts and counsel.

For example, Judge Clarence G. Galston, in the trial of this case in the district court, held that the decision of this Court in *Estep* v. *United States* (327 U. S. 114) reversed the *Falbo* decision. In the trial court the Government argued that the *Falbo* decision applied. (Record page 39) Judge Galston said that since the *Estep* case was decided, "a rather different situation" is presented "and I am prepared to follow the admonition in the *Estep* case and therefore consider the whole record and not distinguish" between the cases. (Record pages 39-40)

Judge Philip L. Sullivan of the United States District Court for the Northern District of Illinois, in *United States* v. *Dewitt Elwyn Whitmer*, No. 46, Cr. 5, decided March 13, 1946, stated: "I am convinced that the *Estep* and *Smith* case overrules the *Falbo* case."

A similar conclusion was reached by Judge J. Joseph Smith of the United States District Court for the District of Connecticut, in *United States ex rel. Flakowicz* v. *Alexander*, decided December 4, 1946. In that case Judge Smith said: "In the case at bar, unlike the *Smith* and *Estep* cases

(1946) 327 U. S. 114, and the *Kulick* case (CCA-2) October 29, 1946, the petitioner refused to appear at the induction center. In that respect, it is similar to the *Falbo* case. However, at the time of Falbo's refusal to report, final determination of physical fitness and acceptability to the armed forces was made at the induction center following compliance with the order to report for induction. Subsequent to the *Falbo* case, however, the Congress required that final determination of physical fitness and acceptability to the armed forces be made upon request prior to the actual reporting for induction to avoid the hardship incident in the uncertainty of the registrant's future entrance into the armed services until time of actual induction. *Act of December 5, 1493, c. 342, sec. 5, 57 Stat. 599.* It is true that the new requirement of Congress posed some administrative problems and led the Selective Service System to provide for cases in which examination, and determination of fitness, were not followed by induction within a ninety-day period. However, it seems plain that the Congress was attempting, insofar as possible, to provide for the completion of the administrative determination of fitness and acceptability prior to the date of actual induction, and it would seem that in practically all cases the administrative process was actually terminated upon the issuance of the certificate of fitness. . . . The amendments to the Act and regulations ended the system of final determination of eligibility, and acceptability, at that time and place, and required that it be done at some time prior to the date of induction. . . . [¶] 'All had been done which could be done' by Flakowicz. The date of induction had arrived. True, the language of the *Falbo* and *Billings* cases appears to require actual reporting at the induction center. Yet both cases involved registrants ordered to report under the system in force prior to the Congressional provision of pre-induction physical examinations and the amendment

to the regulations to conform to the Congressional directive. . . . [¶] Flakowicz had taken every possible step in the administrative process. On the morning of March 8, 1944, nothing had been done by the board or the director of Selective Service to reopen his classification or postpone his induction. The only function to be performed on that morning was submission to induction. Under those circumstances the Court will not require the empty gesture of reporting and refusing in person, instead of refusing by letter, in order to allow a testing of the legality of the classification." *United States ex rel. John Flakowicz* v. *Myrl E. Alexander, Warden,* Judge J. Joseph Smith.*

In view of the conflict of opinions between various circuit courts of appeals upon this matter, it certainly ought to appeal to this Court to say something about these questions rather than keep the bench and the bar in the dark by a *per curiam* order like that entered in this case.

The second and fifth circuit courts of appeals have held that the certificate of fitness issued upon preinduction physical examination showing acceptance for service by the armed forces constitutes an exhaustion of administrative remedies so as to permit draft board orders to be challenged in defense to indictments charging registrants with failure to report for induction into the armed forces. *Alexander* v. *United States ex rel. Kulick,* No. 840 October Term 1946; *United States* v. *Balogh,* No. 800, October term 1946; *Cahoon* v. *United States,* No. 183, October Term 1946 (see opinion of the Circuit Court of Appeals on petition for rehearing, 155 F. 2d 150); *Turner* v. *United States,* No. 871, October Term 1946; *Garland* v. *United States,* No. 911, October Term 1946; *Wells* v. *United States,* No. 916, October Term 1946.

A contrary view has been taken by the United States

* This same reasoning and interpretation on the amendment of the Act and regulations was adopted by this Court in Gibson v. United States and Dodez v. United States, decided December 23, 1946, 67 S. Ct. 301, 305-306.

Circuit Court of Appeals for the Tenth Circuit in *Hudson* v. *United States,* No. 887, October Term 1946.

The conflicts of the courts upon this matter should be ground enough to justify this Court in granting the petition for rehearing and restoring this case to the docket and setting it down for submission on oral argument and briefs.

It is true that the respondent was ordered to report for induction more than 90 days from the date he was given a preinduction physical examination. It is also true under the regulations that a preinduction physical examination more than 90 days old will not be acceptable to the armed forces. But these facts do not require a conclusion that the respondent had not exhausted his administrative remedies. The acceptance upon the preinduction physical examination given more than 90 days before his order to report for induction makes inapplicable the *Falbo* decision. The reason for this is that the amendment to the Act marked the line where the administrative remedies are exhausted at the time the preinduction physical examination is given, which is unaffected by regulations of the armed forces and the Selective Service System's which provided that acceptance upon a preinduction physical examination more than 90 days old will not be final. 50 U. S. C. App. 303, 304 (a), 57 Stat. 596, 599.

The purposes of the amendment to the Act cannot be defeated by regulations requiring physical examination simultaneously upon reporting for induction. The amendment to the Act mandatorily required that the certificate of fitness be issued before the order to report for induction was made.

Prior to the amendment to the Act eliminating the determination of acceptability simultaneously with reporting for induction, a great evil had developed through the interruption of the life and business of thousands if not hundreds of thousands of selectees ordered to report for in-

duction who were discharged as physically unacceptable upon reporting for induction.

When the proposed amendment to the Act was being considered by the United States Senate, the following deliberations were had, as reflected by 89 Congressional Record, pages 8079, 8129-8133:

Mr. BUSHFIELD [South Dakota]:

. . . By way of explanation, let me say that most of the men whose classifications the Senate has been discussing have established homes, businesses, or professions. The record of the Selective Service indicates that forty and a fraction percent of all men called in the United States during the month of August [1943] were deferred because of physical defects. In fairness to the group of men who are about to be called if the proposed legislation is not passed, we should afford them every possible opportunity to ascertain in advance whether they will be accepted; because it will be found that 4 out of every 10 men in the class which is to be called will be returned to their homes as unacceptable. In most cases those men will have either sold their businesses, closed their offices, or lost their jobs; and it is not fair to call them and later return them to their homes, if there is an opportunity to ascertain in advance whether they are acceptable. . . .

. . . Evidently the examination is of little value, because the induction center records show that a fraction over 40 percent of all persons examined at the induction centers are returned to their home as unfit.

I say to the Senate that, inasmuch as we have adopted the policy, it is unfair to the heads of families to force them to close their offices or give up their jobs before they are ordered to the induction centers. We should do everything possible to avoid the situation of having a man give up his job, but subsequently,

because he does not pass the physical examination at the induction center, return to his home and have to look for a new job or have to open up another business.

Mr. CLARK of Missouri:

I think the pending amendment is an extremely meritorious one and certainly should be included in the bill. When I was at home I talked to a great number of draft officials, and the situation the Senator [Bushfield of South Dakota] has mentioned was brought up in a great many instances. . . .

The result is that if a man has a little business or has a home on which he is paying, if he sells his business or tries to dispose of his home before he takes his examination and then is rejected for physical reasons or for any other reasons, he will be out of a job or will have disposed of his home. On the other hand, if he has passed the examination, he has only 3 weeks, in the case of the army, or 1 week, in the case of the Navy, to dispose of his home or business, all of which simply means he gives it away.

Mr. BARKLEY [Kentucky]: Mr. President, I should like to say I think the proposal is meritorious, and should be offered as an amendment to the bill. . . .

Mr. HILL [Alabama]: . . . We certainly ought not to do anything which would make any one examinational final.

Much of the argument has been to the effect that insofar as possible the men who are rejected because of physical disabilities ought to be re-examined and taken into the army. . . . There ought not to be a final examination. As I have said, if a man is examined today, what would that examination be worth 6 months, 9 months, or perhaps a year from now?

Mr. BUSHFIELD: We are all pretty much burdened in this country today, and little more burden on

a few doctors in the examining division in the induction centers will not hurt them any more than it hurts the boys who are being called. . . .

Mr. BARKLEY: . . . If they are accepted for induction they go to an induction center and are subjected to a physical examination, under the regulations of the War Department, to determine whether they are fit.

Mr. BUSHFIELD: And 40 percent of them are sent back home.

Mr. BARKLEY: I understand, but if they are found fit, they are inducted.

Mr. BUSHFIELD: That is correct.

Mr. BARKLEY: The examination to determine their fitness takes place before they are inducted. . . . I have had my attention called to cases in which the local draft boards passed men. They went up to their induction centers, were examined, and rejected because of a more or less minor physical defect, which in all probability could be removed within 60 or 90 days, or which might be cured by nature. They were told that they were not fitted at that time to enter the service, and therefore they were not inducted, but they were ordered to report back within 60 days, or told that they would be called back in 60 days or 90 days to determine whether by that time the physical defect had been removed. Under the terms of the Senator's amendment the examination before induction would be final. . . .

Mr. BUSHFIELD: It would be final only in the sense that it is final today, when the man is examined at the induction center and is rejected.

Mr. BARKLEY: It is not final. He may be examined time and time again.

Mr. BUSHFIELD: I know it is not final, because the local board may send him back to the induction center as many times as it sees fit.

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We have been extremely solicitous of the welfare of everyone connected with the war effort. It seems to me that the men who are now being taken into the army under the new policy are entitled to a certain leeway if they want it. I ask Senators, in all seriousness, how many of them would be able to wind up their business affairs during 3 weeks. . . .

I do not believe the inductees particularly care whether the examination is a free one. They want an opportunity to know in advance whether they must lose their businesses, or their offices, or their jobs, before they are taken.

Mr. PEPPER [Florida]: That is what I had in mind. That is what all of us wish to see corrected. We wish to provide that a registrant may have as early an examination as it is possible to give him. . . .

Mr. SHIPSTEAD [Minnesota]: I have personal knowledge of several men who have suffered in consequence of the impracticable procedure which has been followed, and I think this is one of the most reasonable provisions that has been offered for inclusion in the bill at any time. . . .

Mr. BARKLEY: Mr. President, . . . I think that at the end of the amendment the words "shall be binding upon such board in the same manner as now followed upon examination after induction" should be changed to read: "Shall be binding upon such board in the same manner as now followed upon examination immediately prior to final induction." The words "immediately prior to final induction" would be substituted for the word "after", which appears in line 10 after the word "examination".

Mr. BUSHFIELD: I accept the suggestion . . . and ask that the modification in the amendment be made. . . .

Mr. BARKLEY: . . . I should not care to precipitate my examination if I thought I was going to be inducted, unless I was in a hurry to have it done so that I could enter the army. In those cases I suppose the examination would be facilitated, but if I were pretty certain that I could not stand the examination, and still was more or less suspended in mid-air until it was determined, I would naturally want to know what my status was going to be.

Mr. BUSHFIELD: I thank the Senator.

Mr. PEPPER: Mr. President, I should like to ask the Senator if he has in mind that the examination should be final for all time?

Mr. BUSHFIELD: No; no more than at present.

Mr. PEPPER: It is for the particular call?

Mr. BUSHFIELD: Yes.

Mr. PEPPER: So, if he were to be called again the previous examination would not be a finality?

Mr. BUSHFIELD: No; and the Selective Service and the draft boards can send a man back as many times as they want to.

The amendment to the Act, when finally approved by Congress, read as follows:

"Any registrant within the categories herein defined when it appears that his induction will shortly occur shall, upon request, be ordered by his local board in accordance with schedules authorized by the Secretary of War, the Secretary of the Navy, and the Director of Selective Service, to any regularly established induction station for a preinduction physical examination, subject to reexaminations.

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexam-

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ination. Those registrants who are classified as I-A at the time of such physical examination and who are found physically qualified for military service as a result thereof, shall remain so classified and report for induction in the regular order." 50 U. S. C. App. 303, 304 (a), 57 Stat. 596, 599.

By Amendment No. 200 (9 F. R. 440-442), effective January 10, 1944, the present procedure for preinduction physical examination was established. See Section 629 of Selective Service Regulations. This procedure for preinduction physical examination by the armed forces was operative for registrants to be inducted into the armed forces. The effect of this change in the Act was recognized by the Court in *Billings* v. *Truesdell,* 321 U. S. 542, 554-555, where the amendment to the Act and Regulations is discussed.

It is manifest that it was the intention of Congress, in providing for the amendment to the Act, to eliminate entirely the practice of determining the final acceptability of a registrant simultaneously with reporting for induction. The argument of petitioner in this case perverts entirely the amendment to the Act and Regulations. The construction contended for by petitioner would restore the evil practice of physical examination to determine acceptability given simultaneously upon reporting for induction. Certainly to allow the determination of final acceptability simultaneously with reporting for induction would be restoring the practice that was condemned by Senator Bushfield and extirpated by the amendment to the Act and Regulations discussed in *Billings* v. *Truesdell,* 321 U. S. 542, 554-555.

Section 629.1 (b) of the Selective Service Regulations providing for the acceptance upon preinduction physical examination to be effective for only 90 days was taken out of the Regulations by amendment No. 239 dated July 3, 1944. This section reads as follows:

"The armed forces will not accept the results of a preinduction physical examination after 90 days. Therefore,

when a registrant's induction will shortly occur and it appears that the date fixed for his induction will be more than 90 days after the date of his preinduction physical examination, he will be given a new preinduction physical examination before he is ordered for induction unless the Director of Selective Service directs otherwise."

Therefore the Army Regulations (¶ 15 of AR 615-500, August 10, 1944) providing for temporary acceptance for a period of 90 days following the preinduction physical examination do not justify the contention that respondent has not exhausted his administrative remedies. At least, for the purpose of determining the rights of the registrant and in ascertaining whether or not respondent has exhausted his administrative remedies, it must be held that the regulations which authorize the determination of the final acceptability simultaneously with the order to report for induction are *ultra vires* because contrary to the amendment to the Act. "Thus it seems clear, as we have already said, that the Act, rather than the War Department Regulations or the Articles of War, determines the rights and duties of selectees, as distinguished from inducted men." *Billings* v. *Truesdell,* 321 U. S. 542, 552.

Moreover, Section 629 of the Selective Service Regulations specifically provides that "Every registrant, *before he is ordered* to report for induction, *shall be given a preinduction physical examination* under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent." (Emphasis added)

It should be observed that this old provision had absolutely no effect at the time Balogh was ordered to report for induction. It had been deleted long before he was ordered to report.

If according to army regulations a preinduction physical examination would not be acceptable to the armed forces

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after 90 days then it would be the duty of the draft boards to give the registrant another preinduction physical examination rather than order him to report for induction where a physical examination would be given as a part of the process leading up to induction. Indeed Section 629.1 (b), above quoted, mandatorily required that the preinduction physical examination be given before the registrant is ordered to report for induction. Therefore it must be conclusively presumed that the preinduction physical examination that respondent received prior to the time he was ordered to report for induction was acceptable to the armed forces.

If this Court reaches the conclusion that the administrative remedies were not exhausted because the preinduction physical examination was more than 90 days old at the time respondent was ordered to report, then counsel says that the petition for rehearing should nevertheless be granted because the judgment of the court below reversing the conviction can be properly affirmed upon other grounds. The issuance of the order to report for induction without previously giving respondent a preinduction physical examination that would be acceptable to the armed forces is an *ultra vires* act in defiance of the amendment to the Act and section 629.1 of the Regulations requiring that preinduction physical examination be given before the order to report issues.

"It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense that it acted beyond its jurisdiction could be interposed in a prosecution under § 11. That case would be comparable to *Tung* v. *United States,* 142 F. 2d 919, where the local board ordered a registrant to report for induction without allowing him the appeal to which he was entitled under the regulations." *Estep* v. *United States,* 327 U. S. 114.

In *Tung* v. *United States,* 142 F. 2d 919, the defendant did not report for induction. Under the Government's argument he had not exhausted his administrative remedies because the order to report was a nullity inasmuch as it was issued in violation of the Act and Regulations. Therefore, for the same reason, it must be held that the order to report in this case is a nullity because it was issued without a preinduction physical examination by the army to finally determine his acceptability, and that it was not necessary for respondent to report. Furthermore, the decisions in *United States* v. *Peterson* (DC-ND-Calif.) 53 F. Supp. 760, and *United States* v. *Lair* (DC-ND-Calif.) 52 F. Supp. 312, apply here.

Inasmuch as the order to report for induction was void at the time it was issued, in spite of the fact that respondent may be held not to have exhausted his administrative remedies, as Tung had failed to do in the *Tung* case, *supra,* the judgment of the court below should nevertheless be affirmed. Instead of granting certiorari, the Court should set aside the order granting certiorari and enter an order denying certiorari because the judgment of the court below rested on another valid ground which was adequate to support it. *Bell Telephone Co.* v. *Van Dyke,* 296 U. S. 533; *Laws* v. *Davis,* 281 U. S. 702.

In event the Court, upon consideration of this petition for rehearing, is of the opinion that the petition for rehearing should not be granted for the reasons hereinabove discussed, respondent says that the order of this Court should be clarified. The order of the Court is ambiguous. The Court vacated the judgment of the court below and remanded the case to the United States Circuit Court of Appeals for the Second Circuit, citing *Falbo* v. *United States,* 320 U. S. 549. From a reading of the order it is not clear what the Court intended for the Court of Appeals to do in this case. From one reading of the order the conclusion may be reached that this Court intended for the

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Court of Appeals to reconsider the case in light of the *Falbo* decision and pass upon the question of whether or not the administrative remedies had been exhausted, which the court of appeals did not discuss in its opinion. From another reading of the order the conclusion may be reached that this Court is of the opinion that the judgment of the court below departed from the *Falbo* decision and therefore the court of appeals should not have considered the validity of the order to report but should have affirmed the judgment of the district court because the case came within the ambit of the *Falbo* decision. If this Court intended for the case to be remanded to the court below for further proceedings and consideration of whether the *Falbo* decision applies, it would be enlightening to the court below and counsel to have the Court so state. If the Court intended that the judgment of the district court should have been affirmed under the doctrine of the *Falbo* decision, then it would remove any doubt from the matter by directing the court below to affirm the judgment of the trial court. As the order now stands, counsel is in a quandary as to what steps to take when the mandate gets back to the court of appeals. For these reasons counsel suggests that if the order of this Court dated January 20, 1947, is allowed to stand in this case it should be clarified so that everyone concerned will know what to do.

If this Court took the action it did in vacating the judgment of the court below and remanding the case to the court of appeals because it was of the opinion that respondent had not exhausted his administrative remedies for the reason that the preinduction physical examination was more than 90 days old at the time he was ordered to report, then such reasons could best be stated in the order so as to avoid confusion in future cases that might come before the courts where the record shows that the preinduction physical examination was given within 90 days of the order to report for induction.

Counsel for respondent now represents the appellee before the court below in the case of *United States ex rel. Flakowicz* v. *Alexander*. If the order of this Court vacating the judgment of the court below was on the ground that the *Falbo* decision applies, then when the appeal of the *Flakowicz* case is considered by the court below it is likely that the Government will argue and it is possible that the court below may conclude that the judgment in the *Balogh* case would require reversal of the order of Judge Smith in the *Flakowicz* case, where the preinduction physical examation was given within 90 days of the order to report for induction.

WHEREFORE respondent prays that the order of this Court dated January 20, 1947, be vacated and set aside and that upon consideration of this petition the writ of certiorari be ordered granted and that the case be set down for oral argument and submission upon the substantial questions of (a) whether respondent exhausted his administrative remedies; and if so (b) whether the indictment should be dismissed because of the invalidity of the order to report for induction.

In event the Court does not order the cause set down for argument and submission upon consideration of this petition, it is further prayed that the order of the Court be vacated and set aside and that an order be rendered and entered denying the petition for certiorari for the reason that the judgment of the court below is based upon adequate

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grounds to support it. In the alternative, respondent prays for further clarification of the order of the Court for the reasons hereinabove discussed. Respondent prays for such other and further relief to which the Court may find him justly entitled.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Respondent

Certificate

The undersigned counsel for respondent hereby certifies that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
Counsel for Respondent

January 27, 1947